

Further, the Commission's Rules require a licensee to know the loading on a given station only at the time that he requests additional channels or at the time that he requests renewal of the authorization, where renewal of the authorization is conditioned on meeting a certain level of loading, *see, e.g.*, 47 U.S.C. §90.658. Since the Commission's Rules do not require Mr. Kay to know the loading on his stations except at those specified times, we respectfully submit that the Commission is not authorized to request such information for purposes of determining whether Mr. Kay is qualified to be a Commission licensee.

Between the time that the complaints were filed on which the Commission's request was based and the time of Commission's request, Mr. Kay had already supplied information to the Commission concerning loading of stations which he operates in the 800 MHz band. Accordingly, with respect to that information, the Commission's request is duplicative and we respectfully refer the Commission to its records of Mr. Kay's response to its earlier request.

The Commission's request is unduly and unreasonably burdensome in light of the local conditions of the Los Angeles market. Mr. Kay is still spending a substantial part of each day recovering from the Northridge earthquake of earlier this year. Although none of Mr. Kay's radio facilities was substantially damaged, his office and shops suffered significant damage, as did his residence. Because of the extent of damage to his home, Mr. Kay is in the process of acquiring a different residence and that activity is consuming a large amount of his time and attention. Because of the economic disruption caused by the earthquake, combined with the pre-existing condition of the Los Angeles area economy, as weakened by the brush fires of late 1993, Mr. Kay is currently spending one full day per week in the activity of collecting his charges from delinquent customers. In sum, Mr. Kay does not have the time and does not have the employee resources necessary to fulfill the Commission's extensive informational request at this time.

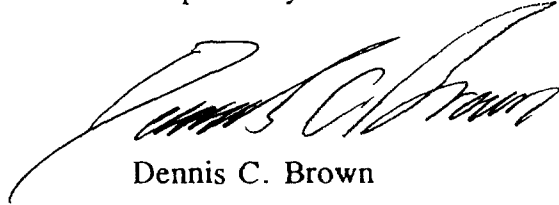
The Commission's Rules prescribe certain consequences for a licensee's failure to have sufficient mobile units and/or control stations in service at certain specified times, *id.* Determination that a person is not qualified to be a Commission licensee is not among those consequences. Since revocation of a license is not among the consequences provided by the Commission's Rules for failure to have sufficient loading, the requested information is not relevant to the stated purpose of the Commission's inquiry.

By submission of the foregoing, Mr. Kay avers that he has fulfilled his obligation in accord with 47 U.S.C. §308(b) by substantively responding to the Commission's letter of inquiry in all respects, including the exercise of his right to decline an invitation to produce information when the request is outside the scope of the law. Mr. Kay stands ready to cooperate with the Commission in all requests which are reasonably calculated to forward the legitimate exercise of the Commission's authority in the fulfillment of its statutory duties. Accordingly, nothing contained herein should be deemed to be a failure by Mr. Kay to comply with all requirements of law.

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We thank the Commission for its letter of inquiry and trust that this is fully responsive thereto. If we can assist the Commission further, please give us a call at your convenience to discuss the matter further.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dennis C. Brown", with a long, sweeping underline that extends to the left.

Dennis C. Brown

## ATTACHMENT 3

# Federal Communications Commission

1270 Fairfield Road  
Gettysburg, PA 17325-7245

May 20, 1994

**VIA REGULAR AND CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Dennis C. Brown, Esquire  
1835 K Street, N.W.  
Suite 650  
Washington, D.C. 20006

Re: Compliance File No. 94G001; James Kay

Dear Mr. Brown:

On April 8, 1994, you submitted a letter on behalf of your client, James A. Kay, Jr., in reply to a Commission inquiry dated January 31, 1994, requesting information pursuant to § 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 308(b).

Kay's letter is inadequate, evasive, and contrived to avoid full and candid disclosure to the Commission. Kay's letter represented a studied effort to avoid producing any information. His failure to disclose pertinent information to the Commission has raised a substantial question about his qualifications to be a Commission licensee. The response is elusive and apparently designed to conceal his operating practices. Kay failed to adequately answer any single question included in our inquiry. Kay is directed to file a fully responsive submission within fourteen (14) days of the date of this letter.

With respect to Kay's request that information provided to the Commission in response to our inquiry be withheld from public inspection, we will not make those materials which are specifically listed under the provisions of Rule 0.457, 47 C.F.R. § 0.457, routinely available for inspection to the public. Therefore, materials which include any information containing trade secrets or commercial, financial or technical data which would customarily be guarded from competitors, will not be made routinely available to the public. Under the provisions of Commission Rules 0.457(d)(2)(i) and 0.461, 47 C.F.R. §§ 0.457(d)(2)(i) and 0.461, a persuasive showing as to the reasons for inspection will be required for requests submitted by the public pursuant to Rule 0.461, which seek information not routinely made available for public inspection under Rule 0.457. You are reminded of your obligation to physically separate those materials to which the request for nondisclosure applies from any materials to which the request does not apply. If a physical separation is not feasible,

the portion of the materials to which the request for nondisclosure applies must be identified. See, Rule 0.459(a).

Kay's claim that the Commission recently disclosed financial information in a finder's preference matter, which target Joseph Hiram requested be kept confidential, is frivolous. In response to a finder's preference request filed by your office on behalf of Kay, Hiram filed three letters stamped "confidential" as part of his Opposition. Hiram later advised the Commission that the three letters could be released to your law office. In a conversation with a member of my staff on March 17, 1994, attorney Katherine Kaercher of your office was advised that the three letters were being released with Hiram's permission. The letters were sent via telefax to your office that same day, with a note that Kay had an additional ten day period in which to comment on the letters. **In light of your firm's knowledge that Hiram's request for confidentiality had been withdrawn, your claim on behalf of Kay that the Commission wrongfully released confidential information is deceptive and highly improper.**

We clearly stated in our letter that we have received complaints alleging that numerous facilities are licensed to Kay on U.S. Forest Service lands but do not have the requisite permits for such use. We went on to explain that without the permits, there is a presumption that those facilities were not constructed and made operational as required by our Rules. Whether or not a station is located on U.S. Forest Service lands is therefore relevant to the stated purpose of the Commission's inquiry. The Commission has also received complaints that Kay's actual loading is inconsistent with the loading that he has reported to the Commission and to the U.S. Forest Service.

Kay should be advised that under the provisions of § 308(b) of the Act, id., the Commission has authority from Congress to require from an applicant or licensee "such other information as it (the Commission) may require," at any time after the filing of an application or during the term of any license. The Commission's resources are to benefit the entire public, not solely to benefit only one licensee.

When asked to name the "type of facility" for each call sign, Kay argued that this request was "not sufficiently specific" to allow him to be sure what the Commission requested. However, he suggested that the requested information is already within the Commission's records.

If Kay did not understand how to respond to the question calling for "type of facility", he had ample opportunity to contact the Commission during the initial 60 day time period provided to respond. Furthermore, on February 17, 1994, your office submitted

a request with the Commission, on Kay's behalf, seeking a tolling of the 60 day period of time in which Kay had to respond to our inquiry, until such time as the Commission replied to the statements in the February 17, 1994 request. In reply, Kay was granted an additional 14 days to supply the information we requested in our January 31, 1994 inquiry letter. If Kay needed clarification of one of our questions, it was his duty to seek it from us prior to the April 14, 1994 revised deadline. He had ample time to seek clarification, but elected not to do so. However, Kay is advised that the term "type of facility", as requested under heading number 2 of our January 31, 1994 inquiry letter, relates to the radio service in which the facility was licensed (i.e., YX, GX, YB, GB, etc.).

As part of our inquiry, the Commission requested that Kay provide a listing of the total number of units operated on each station, with a demonstration of such use substantiated by business records. Kay refused to respond, stating that the question was not sufficiently specific for him to supply the requested information, since "at any given instant of time, Mr. Kay may not know the number of mobile units operated on each of his stations." Kay later states that he "is currently spending one full day per week in the activity of collecting his charges from delinquent customers." Kay's refusal explanation is therefore contradictory, since he must have knowledge of his customer base to be aware of account delinquencies. His refusal to respond is also inexcusable since he was afforded an ample opportunity to clarify the window of time during which the information was requested. Kay is advised, however, that the Commission requests a listing of the total number of units operated on each station for all facilities owned or operated by Kay, or by any companies under which he does business, as of January 31, 1994, (the date of our initial inquiry). Kay is reminded that such demonstration of use during this period must be substantiated by business records.

Failure to provide the requested information constitutes a violation of the Commission's Rules and will subject Kay to sanctions, including a hearing before an Administrative Law Judge to determine whether Kay's licenses should be revoked.

We note that on May 11 and 13, 1994 Kay was notified that we would need an answer to our inquiry in order to determine what action to take on application numbers 415060, 415243, 415255, 628816, 632210 and 415274. We asked for responses by May 25 and May 27, respectively. Those response dates are extended to June 3, 1994 to conform with the instant letter.

The Communications Act requires that a response to a § 308(b) inquiry be signed by the applicant and/or licensee. Please direct Kay's signed response to my attention at the letterhead address.

Sincerely,

A handwritten signature in dark ink, appearing to read "W. Riley Hollingsworth". The signature is fluid and cursive, with the first name "W. Riley" and last name "Hollingsworth" clearly distinguishable.

W. Riley Hollingsworth  
Deputy Chief, Licensing Division

## ATTACHMENT 4



# Federal Communications Commission

1270 Fairfield Road  
Gettysburg, PA 17325-7245

June 10, 1994

**VIA REGULAR & CERTIFIED MAIL -**  
**RETURN RECEIPT REQUESTED**

Dennis C. Brown, Esquire  
Brown and Schwaninger  
Suite 650  
1835 K St., NW  
Washington, DC 20006

Re: Compliance File No. 94G001

Dear Mr. Brown:

This is in response to your letter of June 2, 1994, responding to the Commission's January 31, 1994 request for information pursuant to Section 308(b) of the Communications Act of 1934, as amended.

Your response on behalf of Mr. Kay is woefully inadequate and places Mr. Kay in jeopardy of Commission sanctions which include revocation of licenses, monetary forfeiture, or both. Nevertheless, we are modifying our request, based on Mr. Kay's stated objections, for the information requested in Item 5 of our letter.

In regard to Item 5, information submitted will be kept confidential by the Commission, and only 1 original and 1 copy of the information need be filed. We repeat our request for a list of users as of January 1, 1994, but will accept a list, as detailed in our January 31, 1994 letter, as of any date subsequent to January 1, 1994 convenient to Mr. Kay.

Finally, we caution Mr. Kay on two points. First, unless Mr. Kay is giving free radio service to all of his customers, operating an excess of 7,000 mobile units and control stations, this information is not only readily available to him but necessary in order to send out regular bills to those customers. Second, we notice that you, on behalf of Mr. Kay, appeared in the response to make unilateral rulings on the relevancy of the Commission's request. You do so at Mr. Kay's peril.

Having removed the basis for Mr. Kay's objections, we request him to submit the information in Item 5 of our January 31 letter by July 1, 1994, and repeat our request for a fully responsive reply to the other parts of our inquiry.

At this point we do not have information sufficient to determine whether applications 415060, 415243, 415255, 415274, 415303, 415304, 628816 and 632210 should be granted. We will, however, hold in abeyance our decision on dismissal of those applications until we review Mr. Kay's July 1st response.

Finally, we emphasize that we have been more than reasonable and cooperative in our request and in this modification of it, but we fully intend to carry out our statutory responsibility in this matter. Fairness requires us to warn you that your continued posture in this matter places all of Mr. Kay's licenses in jeopardy of revocation.

Sincerely,

A handwritten signature in dark ink, reading "W. Riley Hollingsworth". The signature is written in a cursive style with a large, stylized "W" and "H".

W. Riley Hollingsworth  
Deputy Chief, Licensing Division

## ATTACHMENT 5

ORIGINAL

**BROWN AND SCHWANINGER**

LAWYERS  
1835 K STREET, N.W.  
SUITE 650  
WASHINGTON, D.C. 20006

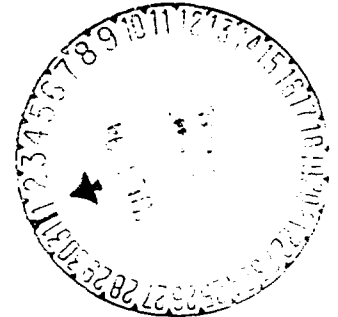
DENNIS C. BROWN  
ROBERT H. SCHWANINGER, JR.  
KATHLEEN A. KAERCHER†  
† NOT ADMITTED IN D.C.

(202) 223-8837

GETTYSBURG OFFICE  
1270 FAIRFIELD ROAD, SUITE 16  
GETTYSBURG, PENNSYLVANIA 17325

June 30, 1994

W. Riley Hollingsworth  
Deputy Chief, Licensing Division  
Federal Communications Commission  
Gettysburg, Pennsylvania 17325



Re: Compliance File No. 94G001  
Application Nos. 415060, 415243, 415255,  
415274, 415303, 415304, 415317, 415322,  
415333, 628816, 632210

Dear Mr. Hollingsworth:

We represent the radio system interests of James A. Kay, Jr. before the Federal Communications Commission. On behalf of Mr. Kay, we hereby respond to various letters from your office concerning the above referenced matters.

1) With respect to Item one of your letter dated January 31, 1994, we respectfully direct your attention to letters which we had written to you on behalf of Mr. Kay earlier in the above referenced matters.

2) With respect to Item two of the Commission's January 31, 1994, letter, we respectfully direct your attention to letters which we had written to you on behalf of Mr. Kay earlier in the above referenced matters.

3) With respect to Item three of the Commission's January 31, 1994, letter, we respectfully direct your attention to letters which we had written to you on behalf of Mr. Kay earlier in the above referenced matters.

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4) With respect to Item four of the Commission's January 31, 1994, letter, we respectfully direct your attention to letters which we had written to you on behalf of Mr. Kay earlier in the above referenced matters.

5 and 6) With respect to Items five and six of the Commission's January 31, 1994, letter, we respectfully direct your attention to letters which we had written to you on behalf of Mr. Kay earlier in the above referenced matters.

In your letter dated June 10, 1994, you stated that "information submitted will be kept confidential by the Commission." Mr. Kay appreciates the Commission's expression and trusts that the following will not be misinterpreted as any questioning of the Commission's integrity: Although the Commission's letter dated June 10 attempts to provide an assurance of confidentiality to Mr. Kay, it is not free from doubt whether the Commission's Freedom of Information Rules, 47 C.F.R. §0.401, *et seq.*, authorize the Commission to determine that it will keep information confidential in advance of its receiving and analyzing the specific information at issue.

Section 4(l) of the Communications Act of 1934, as amended, 47 U.S.C. §154, requires that "all reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier, or licensee that may have been complained of." Your letter dated January 31, 1994, stated that the Commission had received complaints against Mr. Kay and that, therefore, the Commission was conducting an investigation. It would appear that for the Commission to prepare a competent and comprehensive report, it would be necessary for such a report to state the allegation of the complainant and to state the facts as determined by the Commission, which would necessarily disclose some of the proprietary information which the Commission requested that Mr. Kay supply. Because it is not at all certain that the Commission can comply with its own rules and with the requirements of the Communications Act and keep confidential any proprietary information which Mr. Kay might submit, Mr. Kay's declining to supply the information requested by Items five and six of the Commission's request is entirely reasonable.

In Mr. Kay's initial response to the Commission's request, Mr. Kay had explained the practical difficulties which meeting all of the Commission's demands for information would impose on him. In your letter dated June 10, 1994, the Commission revised its request to request "a list of users as of January 1, 1994, but [the Commission] will accept a list, as detailed in [its] January 31, 1994 letter, as of any date subsequent to January 1, 1994 convenient to Mr. Kay." (emphasis in original) Mr. Kay appreciates the Commission's apparent recognition of the practical problems which the Commission's initial massive request for information would impose on him and appreciates the Commission's resulting modification of its request. However, Mr. Kay

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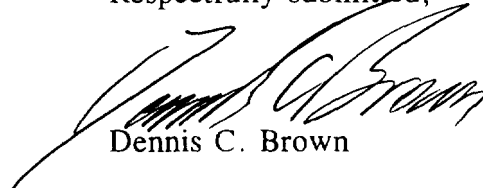
resulting modification of its request. However, Mr. Kay respectfully reports that there is no date subsequent to January 1, 1994 for which the submission of the requested information would be convenient. Therefore, we trust that that report terminates the Commission's request at Items five and six of its January 31, 1994 letter.

In your letter dated June 22, 1994 you noted that Mr. Kay had filed a Petition for Review and Inspection of Employee Conduct, requesting the Chairman's review and inspection of one of the Commission's engineers. We trust that you and the person about whose actions that petition was filed will understand that Mr. Kay's filing of that petition was not motivated by the Commission's actions in the instant matter.

Your June 22 letter expressed a view of the Commission's reasonableness in the instant matter. Although the letter referred to the information which the Commission did release in response to requests filed under the Freedom of Information Act, it did not deal in any reasoned way with the merits of Mr. Kay's motion for an extension of time, which was based on the fact that he is currently before the United States District Court seeking information that the Commission has not released and which, allegedly, formed the factual basis for the Commission's request dated January 31. The Commission's June 22 letter also did not mention that the Commission failed to deal in a timely manner with Mr. Kay's appeal of its initial FOIA action, which left him with no reasonable option but to request the assistance of the courts.

The June 22 letter expressed surprise that Mr. Kay had requested extensions of time and had requested that the Commission assure him of both confidentiality and immunity from criminal prosecution based upon the information which it demanded. However, the letter did not mention that the Commission denied all of Mr. Kay's requests for extension of time or that the Commission declined to grant him immunity and initially declined to provide him with any degree of confidentiality, although it threatened him with sanctions if he did not supply the information which it demanded. The Commission's letter also did not acknowledge that Mr. Kay has twice filed timely responses to the Commission's inquiries in the instant matter. In sum, although the Commission's June 22 letter attempted to stage the lighting of this matter in a particular mood, there is much that the letter left in the dark.

Respectfully submitted,

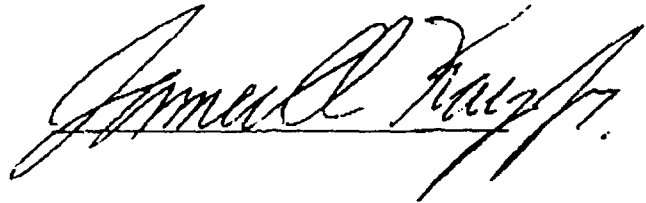


Dennis C. Brown

## DECLARATION

I declare under penalty of perjury under the laws of the United States that the foregoing response to the Commission's request for information is true and correct.

Executed on June 30, 1994.

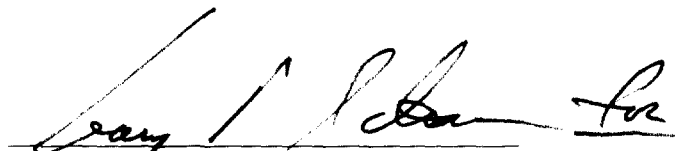
A handwritten signature in cursive script, appearing to read "James A. Kay, Jr.", written over a horizontal line.

## CERTIFICATE OF SERVICE

I, Michelle C. Mebane, a secretary in the Complaints and Investigations Branch, Mass Media Bureau, certify that I have, on this 4th day of December 1995, sent by regular First Class United States mail, copies of the foregoing "Wireless Telecommunications Bureau's Motion For Summary Decision and Order Revoking Licenses" to:

Barry A. Friedman, Esq.  
Thompson, Hine & Flory  
1920 N Street, N.W., Suite 800  
Washington, D.C. 20036

Bruce Aitken, Esq.  
Aitken, Irvin, Lewin, Berlin, Vrooman & Cohn  
1709 N Street, N.W.  
Washington, D.C. 20036



Michelle C. Mebane